Golden Gate University Law Review

Volume 6
Issue 2 *Ninth Circuit Survey*

Article 13

January 1976

Federal Practice & Procedure

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FEDERAL PRACTICE & PROCEDURE

INTRODUCTION

The effectiveness of federal courts in resolving disputes depends upon their uniform and flexible application of procedural and jurisdictional rules. The uniform application of these rules is essential in order to insure rapid adjudication. On the other hand, the unique nature of certain litigation demands that courts interpret these rules in a flexible fashion to insure the equitable disposition of parties' claims. During the survey period, the Ninth Circuit Court of Appeals confronted a wide variety of procedural and jurisdictional issues in the course of dealing with the evergrowing number of civil cases appearing on its docket. While all of the court's applications and interpretations of these issues were undoubtedly significant to the specific parties to litigation before the court, only a limited number of these cases involved issues sufficiently consequential to be discussed in this survey.

The Ninth Circuit resolved important questions involving the existence of federal jurisdiction over disputes involving interstate compacts[1] and the applicability of the final judgment rule to discovery proceedings.[2] The court also examined the appropriateness of the transfer of cases in federal district courts under the doctrine of *forum non conveniens*,[3] the enforceability of "choice of forum" clauses in international contracts,[4] and the availability of class actions to plaintiffs involved in mass aviation disaster litigation.[5] Some of these decisions of the Ninth Circuit increased the

1. *See* League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. Nov., 1975) (per Renfrew, J.), *cert. denied*, 420 U.S. 974 (1975).

2. *See* Premium Services Corp. v. Sperry & Hutchinson Co., 511 F.2d 225 (9th Cir. Feb., 1975) (per Choy, J.).

3. *See* A.J. Industries, Inc. v. United States Dist. Court, 503 F.2d 384 (9th Cir. Sept., 1974) (per Neill, D.J.).

4. *See* Republic Int'l Corp. v. Amco Eng'rs, Inc., 516 F.2d 161 (9th Cir. Apr., 1975) (per Sneed, J.).

5. *See* McDonnell Douglas Corp. v. United States Dist. Court, 523 F.2d 1083 (9th Cir. May, 1975) (per Wallace, J.), *cert. denied*, 44 U.S.L.W. 3564 (U.S. Apr. 5, 1976) (No. 934). In *McDonnell Douglas*, it was held that a class action is not an appropriate means of conducting litigation resulting from an aviation disaster. Other recent Ninth Circuit decisions reflect a similar reluctance to expand the use of class actions. *See, e.g.*, Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. Dec., 1974) (per Trask, J.).

availability of the federal courts to plaintiffs by expanding the purview of federal jurisdiction, while other decisions tended to restrict plaintiff's utilization of various advantageous procedural rules; however, all of the actions of the court were marked by the characteristics of flexibility and uniformity so essential to the functioning of an effective federal judiciary.

I. THE FINAL JUDGMENT RULE

A. BACKGROUND

The federal courts of appeals are courts of limited jurisdiction and their power to hear cases is circumscribed by statute.[6] There are two procedures by which courts of appeals may review district court decisions.[7] The first procedure is by appeal pursuant to 28 U.S.C. section 1291;[8] the second is by prerogative writ.[9] Prerogative writs are extraordinary remedies and are rarely used,[10] whereas appeal is a frequently invoked means of obtaining review. Section 1291 provides for an appeal only from final decisions of the district court.[11] This final judgment rule originated

6. *See* 10 U.S.C. § 7680 (1970); 18 U.S.C. §§ 3147, 3731 (1970); 28 U.S.C. §§ 1291-92, 1651 (1970). For detailed discussions of the relevant statutes see 9 J. MOORE, FEDERAL PRACTICE ¶ 110.02 (2d ed. 1975); Note, *The Finality and Appealability of Interlocutory Orders—A Structural Reform Toward Redefinition*, 7 SUFFOLK U.L. REV. 1037 (1973). Article III of United States Consttitution defines lower federal court's power but does not delineate it.

7. *See* 28 U.S.C. §§ 1291, 1651(a) (1970). Section 1291 provides that: "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." Section 1651(a) provides that: "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

8. *See* note 7 *supra*.

9. *Id.*

10. Although the use of prerogative writs is not within the scope of this article, a brief discussion of this method of obtaining review is appropriate. Courts of appeals may review district court orders and decisions where it otherwise could not do so pursuant to 28 U.S.C. § 1651 (1970). Section 1651 allows courts to issue writs "in aid of their respective jurisdictions." The most common writ used is mandamus, which allows a superior court to require that particular action be taken by a lower court. This type of intervention often results in review of an otherwise nonappealable district court order. If frequently employed, this intervention could destroy the statutory scheme for appellate jurisdiction. In an effort to limit the use of mandamus as a substitute for appeal, courts have ruled that mandamus is appropriate only to correct a district court's abuse of discretion or usurpation of authority. Other extraordinary writs used are writs of prohibition, certiorari, injunction and habeas corpus. *See* 9 J. MOORE, *supra* note 6, ¶ 110.01.

11. For the text of section 1291 see note 7 *supra*.

with the common law notion that a case should be litigated as a single judicial unit.[12]

Traditionally, courts have defined a final decision as one which "ends the litigation . . . and leaves nothing for the court to do but execute the judgment."[13] The need for judicial economy and the desire for rapid adjudication of disputes motivates the use of the final judgment rule. Conducting appellate review after final disposition of the action avoids the potential cost and delay caused by appeals from all interlocutory orders. Additionally, a full and complete trial court proceeding (1) gives the appellate court an overview of the case unencumbered by a record of piecemeal issue resolution; and (2) lessens the burden on appellate court dockets. The benefits of the final judgment rule usually outweigh the disadvantages caused the parties by delayed review of certain orders.[14] Despite the rule's advantages, strict adherence to it occasionally results in undue hardship to one or more parties. For instance, if an order finally determines important rights even though it does not dispose of an entire action, the final judgment rule may deny effective review of such final determinations.

To alleviate the sometimes harsh results occasioned by the rule, the Supreme Court has given the term "final" a "practical" rather than a "technical" meaning.[15] In *Forgay v. Conrad*,[16] the Court sanctioned review of an order even though the main proceeding was still pending.[17] This decision was based upon an acknowledgement that, in Forgay's case, substantial practical harm could result from postponed review of the order. In *Cohen v. Beneficial Industrial Corp.*,[18] the Supreme Court stated that certain collateral orders could be considered final for the purposes of appeal. The *Cohen* Court held that if an order finally determines a substantive claimed right, which is not integral to the cause of action, that order will be considered final even though the primary claim remains pending.[19] *Cohen* thus permits appeal of orders

12. *See* Frank, *Requiem For the Final Judgment Rule*, 45 TEXAS L. REV. 292, 292 (1967).

13. Catlin v. United States, 324 U.S. 229, 233 (1945).

14. Frank, *supra* note 12, at 292-93.

15. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). In an earlier case the Supreme Court noted that "finality" was the general rule, but that where such a rule would "practically defeat the right to any review at all" an exception to it will be made. Cobbledick v. United States, 309 U.S. 323, 324-25 (1940).

16. 47 U.S. (6 How.) 200 (1848).

17. *Id.* at 204.

18. 337 U.S. 541 (1949).

19. *Id.* at 546-47. Relying on the principles of Cohen, United States v. Cefaratti, 202

which settle rights sufficiently independent from the action and sufficiently important to require immediate review. In addition to the qualified meaning Supreme Court decisions have given the term finality, statutory exceptions now exist which allow appeals of certain interlocutory orders.[20] These qualifications and exceptions, however, have not greatly altered federal court adherence to the final judgment rule.

B. Review of Discovery Orders

The typical discovery order does not terminate the main proceeding, nor does it dispose of an independent material right.[21] Hence, district court decisions which compel the production of documents are not usually considered final.[22] Often, however, parties forced to comply with such discovery orders wish to im-

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F.2d 13 (D.C. Cir. 1952), *cert. denied* 345 U.S. 907 (1953), produced a three-prong test for finality:

> an order that does not "terminate an action" but is . . . made in the course of an action . . . has the finality that [28 U.S.C.] § 1291 requires for appeal if (1) it has a "final and irreparable effect on the rights of the parties", being "a final disposition of a claimed right"; (2) it is "too important to be denied review"; and (3) the claimed right "is not an ingredient of the cause of action and does not require consideration with it."

Id. at 16.

20. *See* 28 U.S.C. § 1292 (1970). Section 1292 states in pertinent part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ,
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships . . . ,
> (3) Interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases . . . ,
> (4) Judgments in civil actions for patent infringement which are final except for accounting.
> (b) When a district judge, in making . . . an order not otherwise appealable . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the . . . litigation, he shall so state . . . . The Court of Appeals may thereupon . . . permit an appeal to be taken from such order . . . .

21. *See, e.g.*, Cobbledick v. United States, 309 U.S. 323 (1940), United States v. Ryan, 402 U.S. 530 (1971). *See generally* 4 J. Moore, *supra* note 6, ¶ 26.83[3], at 585.

22. *See, e.g.*, Alexander v. United States, 201 U.S. 117 (1906); United States v. Ryan, 402 U.S. 530 (1971).

mediately challenge their validity. In *United States v. Ryan*[23] the Supreme Court discussed a possible avenue for immediate review of such orders. *Ryan* recognized that, if the individual resisting discovery is held in contempt for noncompliance, the contempt citation may be appealed.[24] During the appeal of the contempt citation, issues relating to the propriety of discovery can be raised under certain circumstances.[25]

Appeal from a contempt judgment, however, is not always a viable alternative for one who is a party to the litigation. Since parties are continuously involved with a case, they can have discovery orders reviewed at the end of trial court proceedings. Hence, courts are hesitant to allow parties to appeal from contempt citations.[26] Only when a party is cited for criminal contempt is immediate review available.[27] Even when criminal contempt is involved, a party may not raise the underlying issues concerning the validity of the court's discovery order[28] except in those rare cases where contempt proceedings provide the only avenue for such review. There is, however, a distinction made between parties to the litigation and nonparties. Since issues affecting nonparties are not normally reviewed at the end of litigation, nonparties can: (1) appeal immediately from civil[29] as well as

23. 402 U.S. 530 (1971).

24. *Id.* at 532.

25. *See* 9 J. MOORE, *supra* note 6, ¶ 110.13[4], at 165-67.

26. *See* Hughes v. Sharp, 476 F.2d 975 (9th Cir. 1973). *See generally* 9 J. MOORE, *supra* note 6, ¶ 110.13[4], at 167.

27. *See* International Business Machs. Corp. v. United States, 493 F.2d 112, 114-15 & n.1 (2d Cir. 1973); 9 J. MOORE, *supra* note 6 ¶ 110.13[4], at 164.

28. *See* United States v. UMW, 330 U.S. 258, 292-95 (1947), *citing* Howat v. Kansas, 258 U.S. 181 (1922); Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 216-17, 243 (1971). *See also* Rendleman, *More on Void Orders*, 7 GA. L. REV. 246 (1972). The *Howat* Court stated:

> It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders . . . are to be respected and disobedience of them is contempt of its lawful authority to be punished.

Howat v. Kansas, *supra* at 190. Similarly, one commentator has noted that

> to preserve respect for the courts, legal error in issuing an injunction cannot be argued as a defense to a contempt charge following violation. Thus, if the issuing court has jurisdiction, error in granting the injunction can only be challenged in the injunction proceeding, not collaterally attacked in a subsequent contempt proceeding.

Rendleman, *supra* at 247-48.

29. *See* International Business Machs. Corp. v. United States, 493 F.2d 112, 115 n.1 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

criminal contempt;[30] and (2) raise issues concerning the validity of the court's order during such appeal.[31] These rules apply even if the nonparty is not subject to the jurisdiction of the court in which the main proceeding is pending.

Different rules obtain when nonparties succeed in defeating a party's attempts at discovery. In such cases the party to the litigation who was denied discovery would want to seek review. Review cannot be obtained when the nonparty is subject to the jurisdiction of the court in which the case is pending, for review would be possible at the termination of litigation. This past term however, a Ninth Circuit panel, in *Premium Services Corp. v. Sperry & Hutchinson Co.*,[32] dealt with the finality issue in a situation where the nonparty was *not* subject to the jurisdiction of the trial court. The court concluded that the party could obtain immediate review.

In *Premium Services*, the court considered the finality of an order quashing a subpoena duces tecum. The subpoena was served by a party to litigation in a Minnesota federal district court upon a California resident who was not a party to that litigation. The California resident moved in a California federal district court to quash the subpoena and the district court did so in part. The Minnesota litigant appealed that order to the Court of Appeals for the Ninth Circuit. The court observed that when a nonparty is outside the jurisdiction of the forum court, and the party seeking discovery is denied such discovery, the traditional avenues of review are foreclosed. In such situations contempt issues obviously do not arise because noncompliance is not at issue. Nor may the party denied discovery review such a denial by appeal of the final judgment since the nonparty is not subject to the forum court's jurisdiction.[33] Immediate review should thus be allowed. Not only has the district court denying discovery said its "final" word on the issue, but without immediate appeal the party denied discovery may, in effect, not obtain meaningful review of the adverse order.[34]

Premium Services illustrates the court's position that finality questions should be resolved by "common sense" evaluations of operative facts in light of congressional intent rather than by for-

30. *See* 9 J. MOORE, *supra* note 6, ¶ 110.13[4], at 164 & n.12.
31. *See, e.g.*, United States v. Ryan, 402 U.S. 530, 533 (1971).
32. 511 F.2d 225 (9th Cir. Feb., 1975) (per Choy, J.).
33. *Id.* at 228.
34. *See id., citing* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

malistic tests.[35] The court recognized the precarious position in which the Minnesota litigant might find himself if the court were to rigidly apply the final judgment rule. Because appellate review by any other means was effectively foreclosed, the Ninth Circuit held the district court's order final and appealable.[36]

II. FEDERAL JURISDICTION OVER INTERSTATE COMPACTS

Federal courts are courts of limited jurisdiction.[37] Various statutes define the subject matter over which the federal courts may exercise their original jurisdiction.[38] Under 28 U.S.C. section 1331(a)[39] there is original jurisdiction in federal court if: (1) the case involves a federal question; and (2) the plaintiff's action "arises under" the Constitution, laws or treaties of the United States. An action presents a federal question when a right or immunity, claimed by one of the parties, is created by the Constitution or laws of the United States.[40] An action cannot "arise under" the laws of the United States or its Constitution unless an interpretation of rights or immunities created by such laws is an essential element of the plaintiff's complaint.[41] The issues raised

35. Thus the court states that:

> [T]he [Supreme] Court . . . [has] applied common sense to the statutory language. Congress limited our jurisdiction to review of "final decisions" not in order to deny appeal arbitrarily to some parties on some issues, but to enable all stages of litigation to be reviewed in one proceeding.

511 F.2d at 228.

36. *Id.* at 228. Courts in other circuits which have held similarly include: Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967); Ochsner v. Mills, 382 F.2d 618 (6th Cir. 1967); Carter Pdts., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966); Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762 (D.C. Cir. 1965); Horizons Titanium Corp. v. Norton Co., 290 F.2d 421 (1st Cir. 1961).

37. U.S. CONST. art. III, § 2, states in pertinent part: "The judicial Power shall extend to all Cases, . . . arising under this Constitution, the Laws of the United States, and treaties made . . . under their Authority . . . ."

38. *See, e.g.*, 28 U.S.C. §§ 1331 (federal question jurisdiction), 1332 (diversity of citizenship), 1333 (admiralty jurisdiction) (1970).

39. 28 U.S.C. § 1331(a) (1970) provides that

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

40. *See* League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517, 519 (9th Cir.Nov., 1975) (per Renfrew, D.J.), *cert. denied*, 420 U.S. 974 (1975).

41. *See* Gully v. First Nat'l Bank, 299 U.S. 109 (1936). The Court elaborated further on its "essential element" requirement by stating

> The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one

by a dispute over the meaning of a law of the United States are an essential element of the complaint if the success or failure of plaintiff's action depends upon an interpretation of said laws.[42]

Litigation involving interstate compacts presents special problems with regard to whether a federal district court has original jurisdiction. Although multi-state compacts must be ratified by Congress,[43] district courts have traditionally refused to exercise their jurisdiction over cases involving the construction of such compacts.[44] The courts based their refusal on the belief that interstate compacts pose questions of primarily state concern, and therefore states should have the first opportunity to litigate such disputes.[45] These district courts specifically rejected the notion that congressional consent transforms a compact into a law of the United States within meaning of section 1331(a).[46]

> construction or effect, and defeated if they receive another. A genuine and present controversy . . . must exist with reference thereto . . . .

Id. at 112-13 (citations omitted).

42. The *Gully* Court required in addition that "the controversy must be disclosed upon the face of the complaint, unaided by the answer . . . ." *Id.* at 113.

43. *See* U.S. CONST. art. I, § 10, which provides in pertinent part: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

44. *See, e.g.*, Rivoli Trucking Corp. v. American Export Lines, 167 F. Supp. 937 (E.D.N.Y. 1958); Delaware River Joint Toll Bridge Comm'n v. Miller, 147 F. Supp. 270 (E.D. Pa. 1956).

45. *See* Delaware River Joint Toll Bridge Comm'n v. Miller, 147 F. Supp. 270 (E.D. Pa. 1956). The *Miller* court argued that the subject matter of an interstate compact is not of national interest and therefore cases which arise under such compacts do not call for national treatment. *Id.* at 274. *Miller* suggests that district courts should abstain from exercising their original jurisdiction in compact cases because litigation involving compacts often involve state law. Therefore the only appropriate federal jurisdiction in such cases is the Supreme Court's certiorari jurisdiction. *Id.* at 274 nn.14, 16. The Supreme Court has rejected this notion in Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959). Petty determined that questions concerning interstate compacts must be resolved by reference to federal rather than state law. *Id.* at 279-80. This determination suggests that district court abstention in such cases is inappropriate.

In Rivoli Trucking Corp. v. American Export Lines, 167 F. Supp. 937 (E.D.N.Y. 1958), a district court declined to exercise original jurisdiction over a dispute concerning an interstate compact between New York and New Jersey. The district court specifically rejected the notion that congressional consent transforms an interstate compact into a 'law' of the United States, stating "[n]either the . . . compact between the States . . . nor the Act of Congress consenting thereto are laws . . . within the meaning of . . . [section] 1331." *Id.* at 939. In reaching its conclusion, the court overlooked the recent Supreme Court decision, Delaware River Comm'n v. Colburn, 310 U.S. 419 (1940). *Colburn* established that litigation involving interstate compacts pose federal questions for the purposes of the Supreme Court's certiorari jurisdiction. *Id.* at 427.

46. *See, e.g.*, Rivoli Trucking Corp. v. American Export Lines, 167 F. Supp. 937, 939 (E.D.N.Y. 1958); Delaware River Joint Toll Bridge Comm'n v. Miller, 147 F. Supp. 270, 274 (E.D. Pa. 1956).

This term the Ninth Circuit confronted for the first time the issue of whether construing a bi-state compact entails a determination of rights and immunities created by a law of the United States. The court concluded that such a determination is involved, and thus rejected the view that district courts do not have original jurisdiction over disputes regarding the construction of interstate compacts. In *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*,[47] the court determined that, because congressional consent transforms a compact into a law of the United States, jurisdiction is appropriate if the construction of such a compact is an essential element of the complaint.[48] *Save Lake Tahoe* drew support for its conclusion by analogizing to the Supreme Court case of *Delaware River Commission v. Colburn*.[49] The *Colburn* Court held that the interpretation of congressionally sanctioned interstate compacts involves a federal "'title, right, privilege or immunity' which when 'specially . . . claimed' in a state court may be reviewed . . . on certiorari . . . ."[50] Since the exercise of certiorari jurisdiction depends upon the existence of a right or immunity created by the Constitution or statutes of the United States, *Colburn* firmly established that disputes concerning interstate compacts pose federal questions.

Although the *Colburn* Court did not articulate the rationale for this decision, the *Save Lake Tahoe* court concluded that *Colburn* was based upon the assumption that congressional consent transforms an interstate compact into a statute of the United States.[51]

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47. 507 F.2d 517 (9th Cir. Nov., 1975) (per Renfrew, J.), *cert. denied*, 420 U.S. 974 (1975). In this case Nevada and California entered into an interstate compact to create a regional planning agency. Pursuant to this compact, the agency has the power to regulate and control land development in both states. Petitioners alleged that the defendant agency failed to comply with the compact's requirements. Petitioners relied solely on section 1331(a) as a basis for invoking federal jurisdiction, contending that by virtue of congressional consent, the interstate compact became a federal law. For the text of 28 U.S.C. § 1331(a) (1970) see note 39 *supra*.

48. 507 F.2d at 519.

49. 310 U.S. 419 (1940).

50. *Id.* at 427. *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951). 28 U.S.C. § 1257(3) (1970) grants certiorari jurisdiction to the Supreme Court "where any title, right, privilege or immunity . . . is claimed under the Constitution, treaties or statutes of . . . the United States." This statute differs in language from the statute granting original jurisdiction to district courts. *See* note 39 supra. Section 1257(3) refers to "statutes" of the United States whereas section 1331(a) refers to "laws" of the United States. For a discussion of the Supreme Court's certiorari jurisdiction under section 1257(3) see R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE (4th ed. 1969).

51. 507 F.2d at 522. For a thorough discussion of the jurisdictional problems with regard to interstate compacts see Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965). The author would apparently strongly

Because the *Save Lake Tahoe* court saw little reason to distinguish between what was a statute of the United States and what was a law, they concluded that interstate compacts are laws of the United States. Thus, if an essential element of a plaintiff's complaint is the construction of a multi-state compact, district courts have original jurisdiction under section 1331(a).[52]

Although *Save Lake Tahoe* is significant because it deals with an issue never previously discussed by a circuit court of appeals, of equal importance is the court's rationale. As the court stated, not treating bi-state compacts as laws of the United States for one purpose (original jurisdiction), while treating them as laws of the United States for another purpose (certiorari jurisdiction), creates needless inconsistency.[53] The court did, of course, recognize that there is a significant difference between obtaining original and certiorari jurisdiction. However, it correctly observed that the distinction which exists does not require that essentially identical statutory language be interpreted inconsistently. The distinction is that the "essential element" requirement need not be satisfied before certiorari jurisdiction is obtainable.[54] The court held that the plaintiffs in *Save Lake Tahoe* met such a requirement.[55]

Save Lake Tahoe's recognition that interstate compacts pose questions of national concern[56] is also noteworthy. Since multi-

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support the Ninth Circuit's finding with respect to the doctrinal basis of the Colburn decision. *Id.* at 1025. However, he would take issue with the merits of the Supreme Court's decision because of its expansive jurisdictional implications.

52. 507 F.2d at 521. Writing for the Court in Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959), Justice Douglas stated that "[t]he construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3 of the Constitution presents a federal question." *Id.* at 278 (citation omitted). *See* Engdahl, *supra* note 51, at 1025.

53. 507 F.2d at 522. It should be noted that sections 1257(3) and 1331(a) have substantially similar language. *See* note 50 *supra*. For a general discussion of the differences between original and certiorari jurisdiction and their necessary elements see Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952); Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953). The court in Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952) stated:

> the difference between 28 U.S.C. §§ 1257(3) and 1331 is that in the former the title [or] right . . . under the Constitution or laws of the United States may be set up at any stage in the litigation, whereas in the latter the case must "arise," that is, the plaintiff's case must be founded on a right under the Constitution or laws. But the two sections have the same meaning as to what is a right arising or claimed "under the Constitution" or laws.

Id. at 846.

54. 507 F.2d at 522.

55. *Id.*

56. *Id.* at 523, *citing* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959);

state compacts involve national concerns, the fact that federal courts provide a more neutral forum than the courts of a party state should facilitate access to federal courts. The decision in *Save Lake Tahoe*, therefore, insures a more equitable resolution of all rights arising under such compacts. The wisdom of the court's decision is reflected by the support it is now finding in other circuits.[57]

III. CHOICE-OF-FORUM CLAUSES

For many years contracts which contained "choice-of-forum" clauses were invalidated because it was felt that "agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy."[58] In the 1972 case of *The Bremen v. Zapata Off-Shore Co.*,[59] the Supreme Court rejected this anachronistic view because the importance of certainty in international business agreements outweighs any policy justifications for the old rule.[60] Now forum selection clauses are prima facie valid and will be enforced "unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[61] Clauses affected by "fraud, undue influence, or overweening bargaining power" should be considered unreasonable, but there are other grounds for refusing enforcement.[62] The *Zapata* ruling

West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951). The court in *Save Lake Tahoe* implies that if local concerns outweigh national considerations in cases arising under interstate compacts, a different jurisdictional result might ensue. For a decision apparently consistent with this notion see Port Authority Bondholder Protective Comm v. Port of N.Y. Authority, 387 F.2d 259 (2d Cir. 1967).

57. *See* United States *ex rel.* Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975); Kozikowski v. Delaware River Port Authority, 397 F. Supp. 1115 (D.N.J. 1975); Yancoskie v. Delaware River Port Authority, 385 F. Supp. 1170 (D.N.J. 1975). In *Groomes*, although the court felt it unnecessary to determine whether a claim arising under the compact in question presented a claim arising under the laws of the United States, the court cited *Save Lake Tahoe* for the determination of this issue. In a concurring opinion, Judge Garth cited *Save Lake Tahoe* to support his position that congressional sanction transforms an interstate compact into a law of the United States for purposes of 28 U.S.C. section 1331(a) jurisdiction.

58. Carbon Black Export, Inc. v. The Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959).

59. 407 U.S. 1 (1972).

60. *See id.* at 15-18; 13 VA. J. INT'L L. 272, 277 (1972).

61. 407 U.S. at 10.

62. *See id.* at 12; Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294, 1297 (1st Cir. 1974). It is also recognized that if a forum selection clause imposes such serious inconvenience that a litigant is effectively deprived of a day in court, the clause can be invalidated. *Id.* at 1297.

One district court in the Ninth Circuit has discussed the *Zapata* rule in these terms:

> Since there [was] no contention that [the forum selection

has met with almost unqualified approval.[63]

This past term the *Zapata* rule was applied by the Ninth Circuit for the first time.[64] *Republic International Corp. v. Amco Engineers, Inc.*[65] involved certain 1963 highway construction contracts between the Uruguayan Ministry of Public Works (Ministry) and a corporation located in California.[66] The contracts provided that suits arising thereunder had to be brought in the courts of Uruguay. After a dispute concerning payment under the contracts, the corporation brought suit for breach of contract in a California federal district court, notwithstanding the provisions of the forum selection clauses.[67] The district court denied the Minis-

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> clause] is void for reasons such as fraud or overreaching, the burden is on [the party resisting enforcement] to show that enforcement of the clause would be unreasonable and unjust.

Roach v. Hapag-Lloyd, A.G. v. Crescent Wharf & Warehouse Co., 358 F. Supp. 481, 484 (N.D. Cal. 1973).

A recent Ninth Circuit opinion, in Tai Kien Indus. Co. v. M/V Hamburg, 528 F.2d 835 (9th Cir. 1976), shed additional light on what constitutes an unreasonable choice-of-forum clause. The *Tai Kien* case, which involved a towage contract apparently quite similar to the contract at issue in *Zapata*, arose after a typhoon caused a vessel owned by a Taiwan corporation (Tai Kien) to break loose from the German tug M/V Hamburg. The vessel ran aground near the entrance of Apra Harbor, Guam, and sank. *Id.* at 836. The United States brought an *in rem* action against the *Hamburg* in district court in Guam for obstruction and oil spill damage, and Tai Kien filed suit in the same court for damages and for indemnity from the action brought by the government. *Id.* The district court dismissed Tai Kien's suit on the ground that the towage contract contained a forum selection clause which referred all disputes to the Supreme Court of Justice in London, and Tai Kien appealed. The Ninth Circuit affirmed, citing *Zapata*. *Id.*

In addition to stating that the record showed no fraud or overreaching in the contracting process, the *Tai Kien* court stated that enforcement of the clause was not unreasonable or unjust because: (1) the contact with Guam was "wholly fortuitous;" and (2) "[p]endency of [a] contemporaneous action . . . arising from the same occurrence is not a reason for avoiding the clause [because] it is quite foreseeable that if a vessel sinks, third persons, who are not parties to a contract for the voyage, will be injured or bring suit." *Id.*

63. *See, e.g.*, 58 CORNELL L. REV. 416 (1973); 86 HARV. L. REV. 52 (1972); 13 VA. J. INT'L L. 272 (1972).

64. *See* Republic Int'l Corp. v. Amco Eng'rs, Inc., 516 F.2d 161 (9th Cir. Apr., 1975). A California district court had discussed the rule earlier in Roach v. Hapag-Lloyd, A.G. v. Crescent Wharf & Warehouse Co., 358 F. Supp. 481, 484 (N.D. Cal. 1973), and another Ninth Circuit panel has recently applied *Zapata* in Tai Kien Indus. Co. v. M/V Hamburg, 528 F.2d 835 (9th Cir. 1976). *See* note 62 *supra*.

65. 516 F.2d 161 (9th Cir. Apr., 1975) (per Sneed, J.).

66. The contracts in question had been assigned by a California corporation to the plaintiff, a Delaware corporation, but the court's treatment of the forum selection clause issue was not affected by the assignment or other aspects of the contract's rather involved performance history. *See id.* at 163-65, 168-69.

67. The plaintiff corporation was unsuccessful in having certain issues relating to payment under the contracts and the validity of an assignment of the contract resolved in their favor by the Uruguayan courts. *Id.* at 164. This fact may have influenced its

try's motion to dismiss the complaint for want of jurisdiction, and the Ministry appealed after withdrawing from the suit and suffering a default judgment. The *Republic* court reversed the district court on the ground that the choice-of-forum clauses—which were presumptively valid under *Zapata*—did deprive the district court of jurisdiction.[68]

Republic is noteworthy in two respects. First, the choice-of-forum clauses controlled even though they were negotiated before *Zapata*,[69] and despite the fact that the corporate plaintiff could clearly have obtained personal jurisdiction over the foreign Ministry in California.[70] Second, the court did not discuss any of

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decision to file suit in California.

68. *Id.* at 168-69.

69. Indeed, suit was filed in district court 11 days before *Zapata* was decided.

70. The *Republic* court discussed the issue of personal jurisdiction even though such discussion was not essential to the disposition of the case. *Id.* at 166-68. The Ministry contended that the district court lacked personal jurisdiction over it. Judge Sneed rejected this contention. He pointed out that in diversity cases federal courts must determine a party's amenability to suit by looking to the law of the state in which the court sits, and that under California's liberal long arm statute the district court did have personal jurisdiction. *Id.* at 166-67. The discussion of the personal jurisdiction issue seemed to be the court's way of clarifying for the lower federal courts the status of California jurisdiction law. The court also reiterated that California's law is subject to due process limitations as they have been defined by the Supreme Court. *Id.* at 167, *citing* Hanson v. Denckla, 357 U.S. 235 (1958).

Unfortunately, the *Republic* court's guidance may have been quickly outdated by subsequent California Supreme Court decisions. *See* Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976); Sibley v. Superior Court, 16 Cal. 3d 442, 546 P.2d 322, 128 Cal. Rptr. 34 (1976). *Cornelison* and *Sibley* elaborate on, but arguably do not clarify, California personal jurisdiction law. *Cornelison* held that there was a sufficient nexus between a cause of action arising from a highway accident in Nevada and California-related activities to justify subjecting a Nebraska resident to personal jurisdiction in California. The Nebraska resident (defendant), while on his way to California, collided with a California resident on a Nevada highway. The defendant was hauling goods into California—an activity he had engaged in constantly as a commercial hauler. He was licensed to haul freight into California by a California agency. Based on these contacts, it was held that it was fair and reasonable to subject the defendant to the jurisdiction of California courts for the limited purpose of resolving the issues arising out of the cause of action in question. 16 Cal. 3d at 149-52, 545 P.2d at 267-69, 127 Cal. Rptr. at 355-57.

The *Sibley* opinion, which was written by one of the justices who dissented to *Cornelison*, and which was dissented to by the justice who wrote the *Cornelison* opinion, creates a certain tension in California jurisdiction law. In *Sibley*, a Florida resident allegedly breached a guaranty agreement which had induced a California corporation to enter into a partnership agreement with a third party. After a dispute arose regarding these agreements, the corporation's attempt to subject the guarantor to the jurisdiction of California courts was defeated by the supreme court on the grounds that neither the nature of the effects caused in California by the nonresident's actions, nor the nature of his relationship with California, was such that the assertion of jurisdiction would be reasonable. 16 Cal. 3d 446-48, 546 P.2d at 324-26, 128 Cal. Rptr. at 36-38.

the grounds on which a party resisting enforcement might rely in an effort to invalidate a forum selection clause.[71] The first point indicates that forum selection clauses in international contracts will be strictly enforced[72] regardless of the date of the contract's execution.[73] The second suggests that the court will not, on its own initiative, examine the record for evidence that enforcement would be unreasonable.[74] In the Ninth Circuit, therefore, *Zapata*'s presumption of validity will make it necessary for a party resisting enforcement to carry the full burden of proving invalidity. The apparent failure of the corporate plaintiff in *Republic* to even raise the issue of validity thus effectively insured an adverse ruling, for forum selection clauses will control if the issue is not raised.

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71. Some of these grounds are discussed at note 62 *supra* and accompanying text.

72. The *Republic* court's apparently unqualified acceptance of the *Zapata* rule's spirit of commercial realism should lead to strict enforcement. It is quite clear that the court would not share one court's opinion that it is "doubtful that [*Zapata*] has substantially changed the law or changed it at all for that matter." Copperweld Steel Co. v. Demag-Mannesmann-Boehler, 347 F. Supp. 53, 54 (1972), *reconsidered and aff'd on denial of motion for appealable order*, 354 F. Supp. 571 (W.D. Pa. 1973).

73. The date of execution could possibly have been considered relevant to the issue of whether the forum selection clauses were taken seriously by the original contracting corporation or its assignee. Since such clauses were generally considered invalid when the contract was formed, *see* 58 CORNELL L. REV. 416, 416 nn. 2-3 (1973), they may not have been regarded seriously.

In *Zapata*, on the contrary, the Court was impressed by the fact that there was "strong evidence that the forum clause was a vital part of the agreement, . . . figuring prominently in [the contracting parties'] calculations." 407 U.S. at 14 (footnote omitted). By ignoring this possible basis for distinction, the *Republic* court indicated that the presumption of validity will operate with full force in the Ninth Circuit. It must be remembered, however, that *Zapata* was announced in an effort to facilitate international business dealings, and that

> [t]oo conclusive a presumption in favor if international forum selection might . . . lead to less freedom of contract in commercial agreements than would be available if the courts take in the future a more sympathetic attitude to the defenses raised by the resisting party.

Note, *The Enforcement of Forum Selection Provisions in International Commercial Agreements*, 11 COLUM. J. TRANSNAT'L L. 449 (1972) (discussing legislatively imposed presumptions).

74. It is possible to infer from the *Republic* court's opinion that such will be the case even if facts exist which suggest overreaching or undue influence. This inference arises when *Republic* is read together with other decisions applying *Zapata*. In Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co., 492 F.2d 1294 (1st Cir. 1974), for instance, the court dealt with a resisting party who did not raise the *Zapata* defenses. The court upheld the forum selection clause in question, but it also implied that it looked for facts which would make validation of the clause inappropriate despite the resisting party's failure to raise such facts. *See id.* at 1297.

In Tai Kien Indus. Co. v. M/V Hamburg, 528 F.2d 835 (9th Cir. 1976), a Ninth Circuit panel intimated that it would not ignore facts relating to the reasonableness of enforcement simply because *Zapata* defenses are not raised on appeal. *See id.* at 836; note 62 *supra*.

Republic reveals the importance of insuring that forum selection clauses accurately reflect the intent of the contracting parties.[75] Now that such clauses are to be enforced in all circumstances where enforcement is reasonable, parties should assume that only the forum selected by contract will be available to them. Of course, in circumstances where enforcement is not reasonable, resistance is in order. Unfortunately, the *Republic* plaintiff's failure to challenge the clause in question deprived the court of an opportunity to set forth guidelines with which to determine when enforcement is unreasonable. Such guidelines are found in *Zapata*,[76] but they are little more than general considerations which must now be supplemented and adapted to particular fact situations by the lower courts.[77]

IV. TRANSFER UNDER 28 U.S.C. SECTION 1404(a)

One year after the Supreme Court decided *Gulf Oil Corp. v. Gilbert*,[78] section 1404(a)[79] was added to the United States Code in

75. For additional relevant discussion on this point see Folsom, *Clauses in International Contracts Involving Choice of Law, Language, Forum and Conflict Avoidance*, in SYMPOSIUM ON NEGOTIATING AND DRAFTING INTERNATIONAL CONTRACTS 41 (1966).

76. *See* 407 U.S. at 15-20.

77. One court apparently accepted jurisdiction because it would have been more "impractical" and "inconvenient" for the plaintiff to litigate in the foreign forum (which was selected by contract) than it would have been for the foreign party to defend in the forum where most of the relevant evidence was. *See* Copperweld Steel Co. v. Damag-Mannesmann-Boehler, 347 F. Supp. 53 (1972), *reconsidered and aff'd on denial of motion for appealable order*, 354 F. Supp. 571 (W.D. Pa. 1973). This view appears to give too little weight to the intentions the parties express in their contracts. *See* Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361 (S.D.N.Y. 1975). It also comes close to confusing the doctrine of *forum non conveniens* with *Zapata*'s goal of fostering certainty in international commercial dealings. *Cf.* 86 HARV. L. REV. 52, 55 n.17 (1972). The best discussion of the factors which might be used to evaluate reasonableness is in *id.* at 58-61. For additional discussion see note 62 *supra*.

78. 330 U.S. 501 (1947). The case involved an action brought in federal district court in New York by a Virginia plaintiff against a Pennsylvania corporation, for damages suffered as a result of a fire which had occurred in Virginia. The plaintiff concededly could have sued in Virginia, where virtually all the potential witnesses and others connected with the fire resided, and where most of the evidence was located. He chose New York as the forum in part because he had concluded that a claim for damages of $400,000 would "stagger the imagination" of a Lynchburg, Virginia jury, composed as it was of persons who he claimed were unaccustomed to dealing with such large amounts. *Id.* at 510. The Court rejected this contention as a basis for suing in New York, and reinstated the district court's order dismissing the action. In so doing, it approved the use in federal courts of the doctrine of *forum non conveniens*, which it defined as the means by which a court could "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.* at 507. Two factors were cited by the Court for consideration in deciding whether to dismiss for forum non conveniens: the interests of both parties in having the case tried in the forum cho-

order to codify and limit the doctrine of *forum non conveniens* as applied in *Gilbert*.[80] The clause in section 1404(a) which limits transfer to a district "where the action might have been brought" was definitively interpreted by the Supreme Court in *Hoffman v. Blaski*.[81] *Hoffman* held this clause to mean that the transferee district must be a district in which the plaintiff had the right to bring an action independent of the wishes of the defendant. Thus, whether or not the defendant consents to the jurisdiction of the proposed transferee district after the plaintiff files suit in the transferor district is irrelevant to a determination of a motion to transfer under section 1404(a). Further, whether the action was one which "might have been brought" in the proposed transferee district is determined by the posture of the case at the time the action is filed in the transferor district.[82] The *Hoffman* decision has been subject to criticism as unnecessary in view of the increas-

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sen by the plaintiff, and possible simplification of the trial court's task by ordering trial in some other forum. If a court, after weighing these two factors against the plaintiff's privilege to choose the forum, concludes that another forum was more convenient, it is entitled to dismiss, even though it has both personal and subject matter jurisdiction and venue is proper.

79. 28 U.S.C. § 1404(a) (1970) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

80. For an analysis of the statute written just after its enactment see Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595 (1951). Judge Kaufman, District Judge of the Southern District of New York, notes that the remedy made available by section 1404(a)—transfer—is less harsh than the remedy of dismissal mandated by the application of *forum non conveniens*. *Id.* at 598. *Forum non conveniens* has largely been superseded in the federal courts since section 1404(a) was adopted, dismissal on this ground now being available only in the rare situation where a forum is available to the plaintiff in a state court or the court of a foreign nation. C. WRIGHT, LAW OF FEDERAL COURTS § 44, at 165 (2d ed. 1970).

81. 363 U.S. 335 (1960). The Supreme Court granted certiorari in *Hoffman* to resolve the conflict which had arisen among the circuits regarding the interpretation of the phrase "where it might have been brought." The issue presented in *Hoffman* was whether a district court in which a civil action had been properly brought was empowered by section 1404(a) to transfer the action on the motion of defendant to a district in which the plaintiff did not have the right to bring it. The court held that the statutory language, "where it might have been brought," cannot be interpreted to mean "where it may now be rebrought, with defendant's consent." *Id.* at 342-43. Rather, it means that transfer is permitted only to a district court in which plaintiff had the right to sue at the time the action was commenced, "independently of the wishes of defendant," and "it is immaterial that the defendant subsequently [makes himself subject by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum]." *Id.* at 344.

For a discussion of whether *Hoffman* represents the definitive interpretation of the phrase see C. WRIGHT, *supra* note 80 § 44, at 167.

82. 363 U.S. at 342-43; Annot., 7 A.L.R. FED. 9, 45-48 (1971).

ingly broad scope of in personam jurisdiction and the requirements of section 1404(a) that the transfer be for the convenience of parties and witnesses and be in the interests of justice.[83]

The Ninth Circuit examined transfer under section 1404(a) in *A. J. Industries, Inc. v. United States District Court*.[84] Two issues of first impression for all circuit courts of appeals were presented in this case. The first was whether the plaintiff's right to bring a counterclaim in a separate action in the proposed transferee court qualifies that court under section 1404(a) as a court where the action "might have been brought." Although two district courts had decided this issue—with different results[85]—no court of appeals had previously dealt with it. The second question was whether the plaintiff's ability to raise the subject matter in the transferee court had to be an absolute one—*i.e.*, not dependent on the court's granting leave to file an omitted counterclaim pursuant to Rule 13(f) of the Federal Rules of Civil Procedure—in order to satisfy the *Hoffman* requirement that the plaintiff be able to raise it independent of the defendant's wishes.

These issues arose in a complicated fact situation. A. J. Industries, the petitioner in this action, and Chesapeake Industries, Inc. had entered into two separate agreements, one involving the sale of stock in the petitioner's subsidiary in return for a promissory note and the other involving a purported merger of the two corporations. In May, 1973, Chesapeake brought suit against A. J. Industries in federal district court in Delaware.[86] A. J. Industries answered the complaint and also filed a counterclaim. That September A. J. Industries commenced a separate action against Chesapeake in federal district court in California. The subject mat-

83. A. J. Industries, Inc. v. United States District Court, 503 F.2d 384, 387 (9th Cir. Sept., 1974) (per Neill, D.J.).

84. 503 F.2d 384 (9th Cir. Sept., 1974) (per Neill, D.J.).

85. Leesona Corp. v. Duplan Corp., 317 F. Supp. 290 (D.R.I. 1970); Foster Wheeler Corp. v. Aqua-Chem, Inc., 277 F. Supp. 382 (E.D. Pa. 1967). In *Foster Wheeler* transfer was denied on the ground that the defendant's right to raise by counterclaim in the transferee court the subject matter of the action sought to be transferred did not qualify that court as a court in which the "action might have been brought" under section 1404(a), where the parties to the two actions were not identical. The court in *Leesona Corp.* took note of *Foster Wheeler* but found that that holding was not mandated by section 1404(a) or by *Hoffman*. It permitted transfer on the ground that where the right to bring a counterclaim against defendant in the proposed transferee forum existed at the time the original action was instituted, that forum qualified as one in which the suit "might have been brought" under the statute.

86. A prior action which A. J. Industries brought in California for a declaratory judgment that it had properly terminated the merger agreement was dismissed and is not relevant to this litigation. 503 F.2d at 385.

ter of A. J. Industries' California claim against Chesapeake could have been raised in its counterclaim in the Delaware action, but was not.[87] Chesapeake moved in the California district court to transfer the action to Delaware pursuant to section 1404(a). The district court ordered the transfer without issuing an opinion.[88] A. J. Industries then petitioned the Ninth Circuit for a writ of mandamus[89] to compel the district court to vacate its order transferring the California action to Delaware on the ground that the court was not empowered to order transfer in light of the construction of section 1404(a) adopted in *Hoffman v. Blaski*. Specifically, petitioner alleged that because A. J. Industries could not have initiated the action in Delaware—since Chesapeake was not amenable to process there[90]—Delaware was not a permissible transferee court.

A. Right to Counter Claim is Sufficient to Permit Transfer

The court first addressed the question of whether A. J. Industries' ability to raise the subject matter of the California action in Delaware by counterclaim qualified Delaware as a transferee court within the meaning of section 1404(a). The court held that it did, and that the transferor court in this case was therefore empowered to order the transfer.

The Ninth Circuit found support for its position in the fact that section 1404(a) has produced considerable litigation and has been subjected to criticism by respected commentators.[91] The

87. For this reason it seems clear that A. J. Industries chose to litigate the subject matter of this action in California rather than in Delaware. It should be noted, however, that the petitioner could only raise the subject as a counterclaim in Delaware; it could not have brought an action against Chesapeake there, since Chesapeake was not amenable to service of process in Delaware.

88. The petitioner contended that district court's failure to issue either a written or oral opinion stating its reasons for ordering the transfer was an abuse of discretion. The Ninth Circuit, however, held that if it appears from a "well-reasoned discussion" that a district court has considered the appropriate factors under the transfer statute a written opinion is unnecessary, and that even an oral opinion is not required "if the record as a whole demonstrates that the factors were considered." 503 F.2d at 389.

89. The propriety of mandamus was not in issue here. Generally, mandamus is appropriate to review section 1404(a) transfers. *See* Van Dusen v. Barrack, 376 U.S. 612, 615 n.3 (1964); Hoffman v. Blaski, 363 U.S. 335 (1960). For a discussion of the circumstances under which review by prerogative writ of transfer orders is proper see 1 W. Barron & A. Holtzoff, Federal Practice and Procedure § 86.7 (C. Wright rev. 1961); 1 J. Moore *supra* note 6, ¶ 0.147 (2d ed. 1975); C. Wright, *supra* note 80, § 44, at 170.

90. 503 F.2d at 386.

91. *Id.* at 387.

court also found persuasive the argument that the statutory requirement that transfers be permitted for the convenience of the parties and in the interest of justice provide ample protection for a litigant in the petitioner's position. It further noted that since the raising of a counterclaim presupposes that the plaintiff in the transferor court is already present in the transferee district (as a defendant in the original suit), this provides a safeguard against his being forced to litigate in an unfamiliar district.[92] Thus, it concluded, the result in *A. J. Industries* is "not inconsistent with many of the policy considerations behind *Hoffman*."[93]

This analysis fails to conceal the fact that *A. J. Industries* may well undermine the requirement enunciated by the Supreme Court in *Hoffman* that the transferee district must be one where the plaintiff could have initiated the action independently of the defendant's wishes. Chesapeake was not amenable to process in Delaware, so that had it not filed suit against A. J. Industries in Delaware, the petitioner could not have availed itself of the Delaware forum. The bringing of the action in Delaware could be interpreted as Chesapeake's waiver of lack of personal jurisdiction; however, consent to jurisdiction should not have been a factor in the outcome of this case.

B. Right to Counter Claim Need not be Absolute

The court next considered petitioner's argument that the standards for transfer under section 1404(a) established by the Supreme Court in *Hoffman v. Blaski* are not satisfied when the right to raise the subject matter by counterclaim is not an absolute right.[94] The petitioner in this case had omitted the subject matter

92. *Id.* This was apparently the fear of the majority in *Hoffman*. Justice Frankfurter in his dissent in *Sullivan v. Behimer*, the companion case to *Hoffman*, argued that the statutory limitations on transfer of section 1404(a) afforded sufficient protection to these plaintiffs. 363 U.S. 351 (1960). This argument was convincing to the Ninth Circuit in *A. J. Industries*. 503 F.2d at 387.

93. 503 F.2d at 387.

94. In Shutte v. Armco Steel Corp., 431 F.2d 22, 24 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), the Court of Appeals for the Third Circuit interpreted *Hoffman* and *Van Dusen* as requiring that the plaintiff's right to bring suit in the transferee district and that the transferee court must have had power to command jurisdiction over all the defendants. The court further required that prior to ordering transfer, the transferor court make a determination that suit could have been initiated in the transferee district. *Id.* Although *Shutte* has been cited in several district court decisions, the "unqualified right" theory does not appear to have been adopted by any court of appeals. It was not cited in *A. J. Industries*, the Ninth Circuit holding that the requirement of an unqualified right was not mandated by section 1404(a), and even if it were, transfer would still have been proper on the facts presented by this case. 503 F.2d at 388-89.

of its California claim from its answer (which was filed prior to its bringing suit in California). It contended that Rule 13(f) of the Federal Rules of Civil Procedure[95] applied in this situation. Since leave of the court was required in order for the petitioner to file an omitted counterclaim once it had answered the complaint in the Delaware action, its right to file was not absolute.[96]

The court determined that it was not necessary to decide whether the petitioner's right to raise its California claim by counterclaim in Delaware was absolute. It held that since section 1404(a) does not require an absolute right in plaintiff to originate the action in the transferee forum, it is sufficient if the subject matter of the transferred suit could have been raised by counterclaim with leave of the transferee court. The rationale for this holding was not dissimilar to that upon which the holding on the first issue was based. The court reiterated that since the petitioner was already present and involved in litigation pending in the transferee court it was not required as a result of the transfer to litigate in a distant and unfamiliar forum. It was also convinced by commentary and criticism of *Hoffman* that it was "unwise to read *Hoffman* as requiring that in every case a plaintiff must have an *absolute* right to raise the subject matter of the transferred suit by

95. Rule 13(f) provides:

> When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

96. Chesapeake contended that Rule 15(a) of the Federal Rules of Civil Procedure applied instead. This rule provides in pertinent part that "[a] party may amend his pleading once as a matter of course *at any time before a responsive pleading is served*" (emphasis added). Chesapeake argued that since A. J. Industries' counterclaim in the Delaware action was a pleading which required a response under Rule 7(a) of the Federal Rules of Civil Procedure, and since Chesapeake did not answer this counterclaim until after suit was commenced in California, Rule 15(a) gave the petitioner an unqualified right to amend its counterclaim to include the omitted counterclaim at the time it filed suit in California.

The Ninth Circuit noted that little authority existed to resolve the question of whether Rule 13(f) exclusively governs the addition of counterclaims or whether Rule 15(a) also applies. Distinguishing Stoner v. Terranella, 372 F.2d 89 (6th Cir. 1967), and a number of district court cases which held that Rule 13(f) applied exclusively, the court stated that when a responsive pleading has not been filed, Rule 15(a) applies; once the pleading is filed, however, Rule 13(f) should be applied.

Thus transfer could have been based on the petitioner's right to raise its counterclaim under Rule 15(a). The court, however, chose not to do so, in the interest of preventing unnecessary judicial burdens in resolving the problems created by applying the two rules. Instead, it based its holding on the theory that section 1404(a) did not require that a plaintiff have an absolute right to raise by counterclaim the subject matter of the transferred suit. 503 F.2d at 388.

counterclaim in the transferee forum."[97] Finally, the court concluded that rule adopted in *A. J. Industries* would preclude a defendant from preventing transfer by intentionally omitting a counterclaim.[98]

At first glance, the transfer policy enunciated in *A. J. Industries* appears in accord with the general policy in federal courts of encouraging judicial economy: since the transfer order required both actions to be tried in Delaware, the possibility of consolidation immediately comes to mind. In this case, however, the two actions could not be consolidated in the transferee forum.[99] The petitioner apparently argued that the California district court could not consider the pendency of the Delaware action in deciding the transfer motion, since consolidation would not be possible if the court ordered a transfer. The Ninth Circuit rejected this argument, although it agreed that the feasibility of transfer was a significant factor in reaching a decision.[100]

A. J. Industries serves to warn defendants who are compelled to defend an action in a forum not of their choosing that asserting their claims by counterclaim may be the only course open to them, unless they are prepared to litigate two actions in the same unsympathetic forum.

Megan Tootell

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97. 503 F.2d at 389.
98. *Id.* at 388-89.
99. *Id.* at 389.
100. *Id.*